

Simon Evers
Financial Markets Law Committee
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Date: 5 October 2009

Dear Simon,

The Committee has raised the possibility of receivers being served with a Contribution Notice under the Pensions Act 2004. As you may know, although the Regulator has issued two Financial Support Directions, it has yet to issue any Contribution Notices. We have consulted the Pensions Regulator and the Insolvency Service and neither body is aware of any receivers (or insolvency practitioners) being subject to, or facing the possibility of, a Contribution Notice under section 38 of the Pensions Act 2004. But, if you have information to the contrary that this has been or is the case, naturally we would be pleased to receive it. It is not clear whether your Committee's concern about section 38 and receivers is the result of an actual case or a theoretical possibility.

The Department's view, which is shared by the Insolvency Service and the Pensions Regulator, is that section 38(3) provides an exemption from the issue of a contribution notice where, in the opinion of the Pensions Regulator, a person is acting as an insolvency practitioner in accordance with section 388 of the Insolvency Act 1986 or within the meaning of section 121(9)(b) of the Pensions Act 2004.

The constituency your Committee are concerned about are receivers who are not acting in the capacity of a licensed insolvency practitioner and who are therefore not protected by the exemption in section 38(3)(c). I understand that an administrative receiver must be a licensed insolvency practitioner but there is no requirement for a receiver to be licensed although he may well be. As indicated in Stephen Leinster's letter of 7 March 2006, the role of a receiver can be very different from that of an administrative receiver or other person imbued with statutory powers or duties which a receiver does not possess. It is the fact of this lack of statutory power or duty which, in part, justifies the difference in treatment accorded to receivers compared with insolvency practitioners. The fact that a receiver is not constrained by the statutory duties which apply to other insolvency practitioners provides scope for the parties to

the security to decide how the receiver's role should be defined. Whereas an administrative receiver can expect to gain control of almost all the property of a company, a receiver, nominated by the terms of a security instrument issued by a bank or lender, may have a much more modest role - taking control of certain only of a company's assets. The role of the receiver might be marginal, but where it is not, we can see no reason why the terms of the security in question cannot be expressed in a way which made the receiver's assumption of liability conditional upon receiving clearance from the Pensions Regulator under s.42.

The changes the Government made to the Regulator's anti-avoidance powers by way of the Pensions Act 2008, in our view, go some considerable distance towards meeting the Committee's concerns. New provisions have been introduced in the Pensions Act 2004 relating to whether it is reasonable for the Regulator to issue a contribution notice. For example, the Regulator must consider the reasonableness of the party's actions (or failure to act) in the circumstances of the case – and this would apply to any of the grounds for serving a contribution notice.

As you are aware, the Regulator is required to act in a reasonable and proportionate way, in accordance with its public law duty and in line with the Regulators' Compliance Code which the Government has issued with Parliamentary approval and came into force on 6 April 2008. A decision to issue a contribution notice has to be made by the Regulator's Determinations Panel - not by its investigatory staff, and any determination could subsequently be appealed to the Pensions Regulator Tribunal, whose decisions are binding on the Regulator; there is the possibility of a further appeal to the Court of Appeal on a point of law.

For the reasons I have outlined, we are not persuaded that an extension of the exemption to cover receivers is necessarily an appropriate policy response to your concerns. It seems to us that the perceived risk to receivers is mitigated by safeguards already contained in the legislation, or is otherwise within the power of the affected parties to assess and manage as the particular circumstances dictate.

Yours sincerely

A handwritten signature in black ink that reads "Ian Garland". The signature is written in a cursive style with a horizontal line above the first name and a flourish at the end.

Ian Garland